Supreme Court, U.S.
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In The

Supreme Court of the United States

FLAVIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether it is a violation of Mr. Perez's rights pursuant to Federal Rule of Criminal Procedure 43(a) to hold a crucial discussion concerning a pivotal point of a Petitioner's trial outside the presence of the Petitioner.

2. Whether the failure to include a jury instruction on Net Worth Analysis in a tax fraud case is a violation of a person's fundamental due process rights.

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OPINIONS BELOW

The Decision of the Seventh Circuit Court of Appeals is reported at 612 F.3d 879 (2010) and is reproduced in the Appendix herein at App. 1-23. The Petitioner was convicted after a jury trial and there was no motion for a new trial, as such there is no reported decision from the lower court.

JURISDICTION

The judgment of the court of appeals was issued on July 6, 2010. Petitioner timely filed a motion with this Court to extend the filing of the present Petition. Said motion was granted up to and including December 3, 2010. This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 7206(1)

Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or

imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF FACTS

The Petitioner, Flavio Perez, was a drywall contractor in the Chicagoland area. He and his wife (Sara Bello and also referred to as Mrs. Perez) eventually started a company called Chateau Drywall. They are not sophisticated people as to finances and they have no higher education other than being high school graduates. After starting the business, they decided to hire a professional tax preparer to do their taxes. Originally the couple hired an individual by the name of Jose Maria Carbahal to do their taxes. Working for Mr. Carbahal at this time was another tax preparer by the name of Urbaldo Rojas. Eventually Mr. Carbahal moved to Spain and as such Mr. Rojas asked Mr. Rubalcaba to buy out Mr. Carbahal's practice. This was eventually done in 1998. When Mr. Rubablcaba took over Mr. Carbahal's practice he described the state of the Mr. Carbahal's practice to be a mess.

Arthur Rubalcaba testified for the government that during the years 2000 and 2001, Mr. Flavio Perez was a client of his as part of his acquisition of Mr. Carbahal's practice. Rubalcaba stated that he prepared a corporate tax return and an individual tax return for Mr. Perez. He testified that usually they prepared the tax returns from the bank statements.

He testified that Rojas generally handled all the detailed work and the day-to-day dealings with the tax payers. He testified that Rojas generally prepared the tax returns and that he signed off on them.

Regarding the 2001 tax year, he had been participating in the preparation of that return and there was an issue about how to treat a $60,000 income entry regarding some real estate. He stated that Petitioner had received property for money that was owed to him, so they paid him off in property instead of cash. The $60,000 entry may not have been worth that much money, so they withheld entering it until getting the valuation of the property.

Mr. Rubalcaba stated that Sara Bello informed Rojas about the $60,000 piece of real estate which was given to them to pay a debt. He further testified that he would never have known about it unless Mrs. Perez had told him. The affect of this transfer was that it should have increased the taxable income for the Perez family for that year. Mr. Rubalcaba stated that he intended to "fix it." However as time went on, Rubalcaba did nothing about the mistake.

In addition to this Mr. Rubalcaba stated that in 2001 Mr. Rubalcaba reduced the sub-contractor expenses of Chateau Drywall. Rubalcaba stated that it was his idea to reduce the sub-contractor expense which, in turn, reduced Mr. Perez's personal income for the year 2001. Mr. Rubalcaba also testified that the Perezes never told him to falsify their returns. The Perezes never asked him to do anything improper

or ever gave him numbers which were ridiculous and false.

Urbaldo Rojas testified for the government that he had been a tax preparer for ten years and that he was presently self-employed. Prior to that he had been a tax preparer for the firm of Rubalcaba, and he had worked with Arthur Rubalcaba, during the years 1998 through June, 2004.

Rojas stated that he prepared the tax returns for Chateau Drywall, Inc. and that he input all the checks and deposits into QuickBooks in order to print out the profit and loss or general ledger for the company. When Rojas received bank statements and other records from Sara Bello, he input them into QuickBooks.

For the year 2000, Rojas prepared the returns using QuickBooks and he used the 1099s that he got from different companies that Perez had worked for. After Rojas printed out the form from QuickBooks, he would give the print-out out to Sara Bello to have her classify the expenses as either business or personal expenses. Rojas received information from Sara Bello that classified the various expenses.

Once Rojas inputted the information into the computer, he would obtain additional information from Sara Bello in order to make adjustments for the preparation of the tax returns. Mr. Rojas also testified as to a transaction of a piece of real estate for $60,000 to the Perezes. When he learned this, he asked Rubalcaba about entering this amount. Rubalcaba

told him not to report it because they did not know the actual cost of that piece of land or its value. As a result, Rojas took the transaction out of the computer and nothing was ever put back in for that. When the 2001 tax return was prepared, there was nothing there to report any amount of income from that real estate transaction, and that was a mistake.

On cross examination, Rojas admitted that he never asked the Perezes to obtain an appraisal of the property to find out how much it was worth. Rojas never told the Perezes that something on the return could possibly be false when they signed it. Rojas stated that he did not prepare the tax returns for 2001, but that Arthur Rubalcaba prepared it.

Rojas testified that he mainly dealt with Sara Bello regarding the taxes for Chateau Drywall. It was Sara Bello who brought in all the records. He never asked Sara Bello for any records she did not bring in. Rojas admitted that the drywall business became much larger in the year 2000 and the return for that year included five or six new schedules. It became a more complex return with increased income. Rojas admitted that he prepared the tax returns for 1999.

For the year 2000, Sara Bello gave the bank statements, cancelled checks, receipts, and information about their investments to Rojas. She gave him documents about the Dean Witter investments. She gave him documents about the rental property and about depreciation issues, the cars, equipment, etc. There was never a time that Rojas asked Sara

Bello for a record that he did not receive. If there was a problem, he would call Sara; he did not call Mr. Perez. Rojas admitted that he took depreciation on all of the company's vehicles. Rojas stated that some of the workers would ask for loans and they paid them off by working for Mr. Perez.

Rojas admitted that there was a $60,000 mistake on the return for the year 2001. But Rojas did not prepare the return for 2001, although he gathered all the information and the documents for the return. Rojas prepared the 1099s for Chateau Drywall, and he had the ability to make any entries in the company's books. Rojas admitted that if he decided he was going to change a number because he thought it should be a different number, he would do that. He stated that Mr. Perez never asked him to do anything that he thought was illegal regarding the returns. He never asked him to put down a number he believed to be false.

For the tax year 2001, there was a $90,000 reduction in the sub-contractor expense made on the General Ledger of Chateau Drywall. For that year, Rojas maintained the General Ledger of Chateau Drywall. Rojas was aware that Rubalcaba had reduced the sub-contractor expense on the General Ledger for Chateau Drywall by the amount of $90,000. He admitted that in the year 2000, when he completely did the return, there was a reduction in the sub-contractor expense of the General Ledger of Chateau Drywall in the amount of $109,404, and he made that reduction himself.

Rojas never prepared a memo to the file explaining the purpose and rationale of those reductions. When asked why he made those reductions, he said, "There were some loans from officers to the corporation, so instead of billing those payments to Flavio as a sub-contractor, it was like a repayment of a loan." Flavio Perez for the year 2000 never asked to take a reduction of $109,000. In addition, he never asked to reduce his sub-contractor expense by $90,000 in the year 2001. So Rojas reduced the Perezes' income in the two years by $200,000 without their ever asking him to do that.

The Government also introduced Mr. Perez's tax returns for the years in question through Leah Swicegood, an IRS Court Witness Coordinator. According to these records Mr. Perez's total income for 2000 was $125,079 and for 2001 it was $268,000.

Richard Lexby testified on behalf of the government as an expert with 30 years of experience within the IRS, investigating violations of Federal tax laws. In the case of Flavio Perez, he employed an investigative tool known as "net worth and expenditures method of proof."

Lexby said that this is not the method a taxpayer would use at the end of the year. A taxpayer would gather documents proving their income during the year and any expenses. Lexby stated that he was using the tool to recreate what taxable income was for the years 2000 and 2001. Employing this method he determined the unreported income to be $117,382 for

the tax year ending December 31, 2000. He did the same calculations for the year ending December 31, 2001 and he came up with unreported income of $203,743.

Lexby admitted that there were other methods of analysis, such as the "specific item analysis" which, in many ways, would give a more detailed and exact figure than the net worth analysis he had used. Lexby admitted that he did not identify as part of his net worth analysis any individuals who claimed to have paid large sums of cash to Flavio Perez in the year 2000 or 2001. On cross examination, Lexby further noted that there were a large volume of transactions from Chateau Drywall in years 2000 and 2001. Lexby did not go through and calculate these transactions as part of his net worth analysis. Lexby stated that in 2001, there was an error they had to adjust for an item of $60,000. It was an error that Mr. Rojas was aware of but did not correct.

Lexby admitted that he had no firsthand knowledge of what information or records Sara Bello gave to Urbaldo Rojas or Mr. Rubalcaba for the tax years 2000 and 2001. He had no idea about any of the documents that were tendered to them by Ms. Bello. Lexby further testified that in his net worth analysis, there was no way of knowing how much cash on hand Mr. Perez had at the beginning of 2000 or 2001. Agent Lexby admitted that the net worth analysis that he testified to is based on the assumption that Mr. Perez's tax preparers did not make any other errors.

Lastly Mr. Lexby also admitted that if the tax preparers' conclusions were not perfect then his analysis in this case would be off.

The Government also presented the testimony of several witnesses concerning statements made by Flavio Perez over the course of time concerning his method of doing business, his offering of cash discounts and this desire to retire early. In addition the Government introduced a deposition given by Mr. Perez in the context of a civil lawsuit in which he was a petitioner. The gist of this deposition was how Mr. Perez conducted the affairs of his business and how he ran its day-to-day operations.

Bernard Brady testified as an expert on behalf of the Petitioner. He stated he was a Certified Public Accountant and Certified Fraud Examiner. He had been a fraud examiner since 1994. Brady stated that with regard to the Perez account, he had reviewed many documents including the returns, documents from the IRS, documents provided by banks, bank statements provided by the Perez family, general ledgers which were obtained from Mr. Rojas, and in addition, he interviewed Mr. Rojas, interviewed Flavio Perez and Sara Perez, and he reviewed many documents in the case. Brady explained, "[i]n the context of an Internal Revenue Service net worth analysis, it needs to be considered in connection with taxable income vs. non-taxable income, deductible expenses vs. non-deductible expenses, and also needs to be fairly, you know, carefully prepared."

Mr. Brady attempted to testify that the Net Worth Method is not the most accurate or reliable method for determining taxable income however the Court would not allow testimony along these lines. Brady further stated that he had found flaws in the net worth analysis done by the IRS.

Brady prepared a brief list of some of the flaws and possible flaws. The defense entered into evidence Exhibit 5 which depicted the flaws that Mr. Brady found in the government's analysis. The first item on the list indicated there was no credit for any cash on hand at the beginning of the year, and the government's analysis did not give Mr. Perez any credit for the cash he may have had in his pocket or at home. Mr. Brady testified that if the government had given him credit for this then it would have decreased the amount of alleged unreported income for that year.

The Second item on the list stated that there are amounts that are reflected under the expenditure section of the net worth analysis that it describes as "ATM withdrawals." The ATM withdrawals represent cash that was drawn by Mr. Perez from his bank account. To the extent that any of that cash would have been used to incur a taxable expense, that particular amount should be reduced on the net worth analysis. A reduction of that particular amount on the net worth analysis would obviously result in a decrease in the unreported income.

The Third item on the list dealt with the fact that the government analysis did not include home office deductions expenses.

The Fourth item on the list dealt with bank balances that were reflected in the net worth analysis and he stated that they did not reflect the book balances. He noted that there was a violation of Generally Accepted Accounting Principles which requires that outstanding checks be deducted in calculating a balance, and they are required for a net worth analysis by the IRS. "It's also common sense for the net worth analysis" that Brady has done, that the outstanding checks for business expenses should be reflected. Brady could not explain why the government did not reflect this in its net worth analysis.

Brady testified that there is an interrelationship between Chateau Drywall Corporation and the sole proprietorship. Brady reviewed the records of the IRS and interviews with Mr. Rojas regarding Chateau Drywall. And at the end of each year, Mr. Rubalcaba determined that the income for Mr. Perez reported on his tax return would have been too high because of the fact that the subcontractor expense was being passed on resulting in the corporation's having a loss. In order to avoid having a loss on the corporation and extra income on the sole proprietorship, Mr. Rubalcaba suggested that they reduce the subcontractor expense on the corporation, which increased its income, and decreased the income on the sole proprietorship, which reduced the total amount of income. Brady also testified that there were payments going back and

forth between the subcontractor, Flavio Perez, and a misclassification could have caused a misstatement of income, and if the income on the tax return is different from the amount reflected on the net worth analysis, that would change the answer.

Brady testified that the net effect of all the items and flaws he had listed on his list, and that the net effect of those particular adjustments would have had a negative effect on income. He did not know exactly how much it would have affected the calculations.

Sara Bello testified that she was the wife of Flavio Perez. When Chateau Drywall opened, Ms. Bello started helping with the collection of papers, such as receipts and bank statements. Prior to that time, Ms. Bello never prepared taxes for the family. Eventually the family retained accountants to assist them with their taxes.

Sara Bello would meet quarterly with Mr. Rojas and she brought him bank statements, check stubs, receipts, anything that he asked of her. If they had bought tools, he required those papers and they tried to give those papers to him quarterly. He answered questions about profits and expenses and if they were personal or for the company, and she would answer his questions in between the quarterly meetings. During the years 1997, 1998, and 1999, there was never an occasion that Rojas asked Ms. Bello for a document or record that she refused to give him. Bello stated that she never gave Rojas any false or

misleading information about their finances. Mr. Rojas never asked her to lie. When Mr. Rojas would finish her tax returns and they were ready, he'd call her and let her know the returns were ready for the company. Sara Bello testified that in the year 2000, Mr. Rojas never called and asked Sara Bello or Flavio Perez to come over for a meeting to go over their tax returns.

Over the years, Mr. Rojas provided documents and would create ledgers for the office and the company. Bello never maintained any books for the company, and Flavio did not maintain books for the company. Neither one of them were bookkeepers for the company. The only books that ever existed for Chateau Drywall were at the Rubalcaba office. These were from the QuickBooks that he created. Bello was shown Government Exhibit No. 7, which is a paper Urbaldo gave her with transactions. He asked Bello if the transactions were business or personal. She did not actually create the document; Mr. Rojas did. She did not even have the ability to create such a document or to have software. There were handwritten notes on the document that she had put there. At several places, she had marked "personal" for personal expenses. In other places, next to the transaction, she listed as "business." Rojas even called Bello over the phone many times over the years, to ask her about particular expenses; and she told him whether they were business or personal.

Bello admitted that sometimes Chateau Drywall had to loan money to subcontractors. She told this to

Mr. Rojas, and she explained that sometimes the subcontractors wanted money in advance; and she would have to give it to them, or they would walk off the job. In order to generate the cash to give them, she would use ATMs or sometimes make a deposit and get cash from the deposit. The deposit would be checks from customers or employers of Chateau Drywall. Bello put down the amount of the deposit and indicated when she kept cash back. There was a time that Mr. Perez had been given a piece of real estate instead of money, to pay down a business debt from a client. They had gotten paid with a piece of land for a job that Flavio had performed for a builder. Sara gave the documentation to Rojas. She said that they had gotten paid for the job with land and that Rojas needed to know about it.

Bello testified that they kept cash on hand for expenses for the business; and that on January 1, 2000, they had about $10-15,000 cash on hand. She stated that they had about the same amount of cash on hand on January 1, 2001. Ms. Bello testified that she never told Mr. Rojas or Mr. Rubalcaba that the only income they received was money they got from a 1099 form. She told Rojas that sometimes, Flavio got paid and that they didn't issue a 1099. These were checks received from employers, and they would deposit them into the account. She explained to Mr. Rojas that these deposits would be reflected on their bank statements. In 2000, Flavio never asked her to misreport or withhold any information from Rojas in connection with their taxes. When Rojas provided the

return that year for 2000, she brought it home and she and Flavio signed it and wrote a check to the IRS for the amount that Rojas put in the tax return, and then put it in the mail. She did not refuse to sign it. Ms. Bello testified that in 2000 and 2001, she never told Rojas to underreport their income on their tax return. She never asked Rojas to make changes to any number on a tax return to some different number that she knew was not true. She never witness Flavio ask Rojas to underreport income for the year 2000 or 2001 on the tax return. She never witnessed Flavio putting anything incorrect or false numbers into the tax returns. When she signed the returns for 2000 and 2001, she never believed or suspected that anything on the returns were false. If she had thought that, she would not have signed it.

At the conclusion of the evidence phase of trial the Court held a jury instruction conference. This conference was held at 7:45 A.M. on February 28, 2008. The Petitioner was apparently never told of this conference. At said time the Court, Prosecution and counsel for Petitioner met to discuss various jury instructions. During this time period a discussion was had a very crucial jury instruction in these types of cases, namely the instruction concerning Net Worth Analysis cases. The importance of this instruction was such that it was the government attorney, Mr. Podliska that was concerned about the Petitioner not being present for this aspect of the case. The following exchange took place:

The Court: All right. In representing your client, you choose to follow a strategy that would not include giving this instruction?

Mr. Cotter: Correct, your Honor.

The Court: Okay.

Mr. Podliska: And I take it since Mr. Perez isn't here – this is something that we've been discussing over the past couple of three day – [sic]

The Court: Right. Have you discussed this with your client as well?

Mr. Cotter: I have discussed it in – I have discussed it with him. I haven't discussed it in terms of explaining Tolbert, of course, and I will confirm this when he gets here. And if you would like, we can put it back on the record that I've now explicitly told him that.

The Court: Let's do this: I'll direct you to relay the Court's comments to him, that I will give the instruction if you offer it.

Mr. Cotter: Certainly.

The Court: And then at the completion of the arguments, if you don't approach me and say you want the instruction given, I'll deem you to have waived whatever rights you have on behalf of your client with his

concurrence to the giving of that instruction. Is that fair enough?

Mr. Cotter: Fair enough, your Honor.

The record is silent as to any further discussion of this point and as such this crucial instruction was not given. After a period of deliberation the Jury found the Petitioner guilty of all counts lodged against him.

REASONS FOR GRANTING THE WRIT

I. THE COURT VIOLATED THE PETITIONER'S RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 43(A).

It is well-established that an accused enjoys a right both at common law and pursuant to the sixth amendment's confrontation clause to be present at all stages of trial. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The defendant's right to be present at trial is also implicated by the fair trial concerns of the Fifth and Fourteenth Amendments, "'to the extent that a fair and just hearing would be thwarted by [the defendant's] absence.'" *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 108, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court explained that a defendant

has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, at 105-106, 108; see also *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975). The Court also cautioned in *Snyder* that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115.

This right has been codified in Federal Rule of Criminal Procedure 43(a) which provides that "the defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a).

In the case at hand Mr. Perez was not present for a crucial aspect of his trial, namely the Jury instruction conference that was held at 7:45 A.M. on February 28, 2008. During this conference the Court along with the government and defense counsel were discussing instructions to be given to the Jury in this matter. Mr. Flavio Perez was not present for this conference.

In the present case while it is true that the Petitioner failed to raise any objection to not being present for this aspect of his case and generally this

would forfeit his right of redress of this point however the Seventh Circuit has previously held that a Rule 43(a) violation is subject to the harmless error standard, even in a case where the issue was not presented to the trial court. *United States v. Patterson,* 23 F.3d 1239 (7th Cir. 1994) citing *United States v. Silverstein*, 732 F.2d 1228 (7th Cir. 1984).

An error is harmless if it does not affect "substantial rights." Fed. R. Crim. P. 52(a). A defendant's absence from a stage of the trial is harmless if the issue involved is not one "on which counsel would be likely to consult [the defendant]," or which the defendant, "if consulted, would be likely to have an answer that would sway the judge." *United States v. Silverstein*, 732 F.2d 1338, 1348 (7th Cir. 1984).

In this particular case the error was not harmless in that the instruction not given was one designed for the benefit of a defendant in a Net worth Analysis case. Mr. Perez should have been present at this crucial juncture of the proceedings, because in essence the Judge was deciding what instructions would be given and how the Net worth analysis works. While, it is true that Mr. Perez's former counsel not only did not object to the instruction not being given, but in fact objected to the instruction being given, this does not excuse the requirements of Federal Rule 43(a) mandating Mr. Perez's presence. There is nothing in the record that Mr. Perez himself was completely aware of what was transpiring with regard to this specific instruction.

In the present matter the Court and the Prosecution was concerned about the instruction not being given to such an extent that both the Court and the Prosecution commented on the fact that Mr. Perez was not present.

The Court: All right. In representing your client, you choose to follow a strategy that would not include giving this instruction?

Mr. Cotter: Correct, your Honor.

The Court: Okay.

Mr. Podliska: And I take it since Mr. Perez isn't here – this is something that we've been discussing over the past couple of three day – [sic]

The Court: Right. Have you discussed this with your client as well?

Mr. Cotter: I have discussed it in – I have discussed it with him. I haven't discussed it in terms of explaining Tolbert, of course, and I will confirm this when he gets here. And if you would like, we can put it back on the record that I've now explicitly told him that.

The Court: Let's do this: I'll direct you to relay the Court's comments to him, that I will give the instruction if you offer it.

Mr. Cotter: Certainly.

The Court: And then at the completion of the arguments, if you don't approach me and say you want the instruction given, I'll deem you to have waived whatever rights you have on behalf of your client with his concurrence to the giving of that instruction. Is that fair enough?

Mr. Cotter: Fair enough, your Honor.

From the above it is abundantly clear that this discussion and this decision to include this instruction or not include it was one that the Court and the Prosecution felt should be done in consultation with Mr. Perez. The Court went at lengths to make sure that Mr. Perez was aware of his absolute right to present this instruction to the Jury. Based on the fact that the Court was concerned on whether or not Mr. Perez was aware of this absolute right he was giving up – Federal Rule of Criminal Procedure 43(a) mandated that Mr. Perez be present. In this case he wasn't present.

Furthermore there is absolutely nothing in the record to indicate that Mr. Perez was voluntarily absent from the trial. These discussions were held at 7:45 A.M. while the trial was scheduled to commence again at 9:30 A.M. In addition Mr. Perez was present at all other aspects of the trial in this case; therefore there is no reason for him to not be present for this portion of the trial. At a minimum the Court should have, prior to the commencement of trial at 9:30 on February 28, 2008 ascertain whether or not Mr. Perez

was aware of what transpired while he was not present. The Court never did this and the record is silent as to whether or not Mr. Perez was even aware of what transpired. The fact that the Court violated Federal Rule of Criminal Procedure 43(a) mandates that this matter be remanded for a new trial in this matter.

II. THE TRIAL COURT ERRED IN NOT INCLUDING A JURY INSTRUCTION WITH REGARD TO THE NET WORTH METHOD.

The United States Supreme Court and the Seventh Circuit Court of Appeals has long recognized the inherent problems and trappings of using the Net Worth Method. *Holland v. United States*, 348 U.S. 121, 99 L. Ed. 150, 75 S. Ct. 127; *United States v. Tolbert*, 367 F.2d 778 (7th Cir. 1966).

In *Tolbert*, the Seventh Circuit Court of Appeals citing the Supreme Court decision in *Holland* at great length stated:

> . . . the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility

> of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

And after stating that "we cannot say that these pitfalls inherent in the net worth method foreclose its use" but recognizing that such pitfalls "require the exercise of great care and restraint" and that "the complexity of the problem is such that it cannot be met merely by the application of general rules" proceeded to admonish that:

> Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

Later in its opinion the Seventh Circuit commented on the fact that:

> [i]n none of the cases relied upon by the government was a conviction in a net worth method tax evasion prosecution affirmed where, as here, there was a complete failure to give any instruction on the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused.

Continuing in its opinion the Seventh Circuit considered it ***plain error*** to not include an instruction on the Net Worth Method. As such the Seventh Circuit clearly stated:

> The clear admonition of Holland with respect to the necessity of appropriate instructions on the nature of the net worth method of proof and on the assumptions and inferences incident thereto is to be considered in the context of the accompanying observations of the Court, including its characterization of this method of proof as being "so fraught with danger for the innocent that the courts must closely scrutinize its use" and the Court's recognition that the complexity of the problem engendered by its use transcends resolution by application of general rules. And such consideration of the total impact of Holland convinces us that the Court intended its admonition with respect to the scope of the instructions to be given in a net worth method prosecution as enunciating a prerequisite essential to safeguard substantial rights of the accused. We are thus impelled to the conclusion that the complete lack of any instruction on the nature of the method

> and its concomitant assumptions and inferences affects a substantial right of the accused and constitutes plain error which brings the matter within the purview of Rule 52(b) of the Federal Rules of Criminal Procedure and requires a reversal despite the lack of an objection by the defendant to such omission.

In looking at this case it is clear that it was plain error to not include the Net worth Method instruction as noted in *Holland* and *Tolbert* in this case. While it is true that Mr. Perez's attorney not only did not object to the instruction not being given but in fact objected to the instruction being given when prompted by the Prosecution's jury instruction packet and by the Court during the discussion on jury instructions this should not preclude this Court from finding plain error.

In this case Mr. Perez would argue, as noted above, that he was not present during this important phase of his trial and that this instruction is mandated regardless of the actions of his attorney. The Net worth Method is so complex and confusing that an instruction on how to properly implement ***must*** be given and as such should have been given in this case. The fact that it was not given mandates that this matter be reversed. The Petitioner would argue that the Seventh Circuit Court of Appeals failed to follow its own precedent in allowing Mr. Perez's

conviction to stand despite the failure of the trial court to include this crucial instruction.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 3, 2010

In the

United States Court of Appeals

For the Seventh Circuit

No. 08-2566

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FLAVIO PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 CR 166 – **John W. Darrah**, *Judge*.

ARGUED FEBRUARY 10, 2010 – DECIDED JULY 6, 2010

Before RIPPLE, MANION, and WILLIAMS, *Circuit Judges*.

MANION, *Circuit Judge*. A jury convicted Flavio Perez of two counts of filing false federal income tax returns. The district court sentenced Perez to 33 months' imprisonment. Perez appeals, claiming that the district court violated his right to be present at trial by conducting a jury instruction conference in his absence. He also challenges the district court's failure to provide a jury instruction on the government's net worth and expenditure method of proof, its

limitation on expert testimony, and the sufficiency of the evidence. We affirm.

I.

Flavio Perez ran a drywall installation company called Chateau Drywall, Inc., and a related sole proprietorship. The sole proprietorship received income from Chateau Drywall and in turn the sole proprietorship distributed payments to Perez and other drywall installers who were classified as independent contractors. Perez reported the income from the sole proprietorship on his Schedule C.

In 2000 and 2001, Perez declared on his federal income tax return (filed jointly with his wife, Sara Bello) total income of $125,079 and $268,387, respectively. The income tax returns were prepared by tax preparers Urbaldo Rojas and Arthur Rubalcaba based on information Bello and Perez provided them.

The government believed that Perez had purposely under-reported his income and charged him in a two-count information with filing false individual federal tax returns in violation of 26 U.S.C. § 7206(1).[1] Perez pleaded not guilty and proceeded to trial. At trial, the government sought to prove its case using the "net worth and expenditure method" ("net worth method"). Under the net worth method, an individual's actual income is estimated by comparing

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[1] Perez waived indictment by a grand jury.

his net worth at the beginning of the tax year to his net worth at the end of the tax year, taking into account expenditures for basic living expenses and any non-taxable sources of assets (such as gifts, inheritances, and loans). *See Holland v. United States*, 348 U.S. 121, 125 (1954) (explaining the net worth method of proof).

The government presented evidence that on December 31, 1999, Perez's net worth was approximately $100,000, that during 2000, he had expenditures of about $123,000, and that by the end of the year his net worth increased to $218,911. Because Perez had reported income of only $125,079 for 2000, the government's expert concluded that (to increase his net worth by as much as he did in 2000) Perez had unreported income of more than $100,000. For 2001, the government's expert determined that Perez's net worth increased from $218,911 to $571,488, and that he had expenditures of approximately $186,000. Because Perez had reported income of only $268,387 for 2001, the government's expert concluded that (to increase his net worth by as much as he did in 2001) Perez had unreported income of more than $200,000.

At trial, the government also presented evidence that Perez gave clients discounts for cash jobs, paid some of his independent contractors in cash, and did not inform his wife – who usually provided the tax preparers with the financial information used to prepare the tax returns – of some of the cash-based jobs. Additionally, the government presented evidence that

Perez provided the tax preparers with a last-minute list of deductions, without any supporting documentation, exceeding by more than $111,000 the amount of deductions they had calculated using business records Bello gave them.

Perez presented his own expert witness who challenged numerous aspects of the government's calculation of Perez's income under the net worth method. Perez also elicited testimony from his expert that the net worth method is "not the most accurate or reliable method for determining taxable income. The most accurate and reliable would be the specific items method that was mentioned by [the government's expert]." The government objected to Perez's expert expressing general criticisms of the method and asked that the expert's testimony be limited to specific criticisms about how the net worth method was applied in Perez's case. At side bar, the district court stated, "[h]e just opined that the net worth analysis itself is somehow unreliable. What's the basis of that opinion?" Perez's attorney responded: "Based on his experience." The district court responded, "No," and the prosecutor then said: "We would move to strike that." The district court then stated:

> Yes. You can render an opinion – he can testify in the form of opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the

> facts. What testimony is he going to offer that would supply the data or facts to support that opinion, and what principles or methodology did he use to result to arrive at that opinion?

Rather than respond to the district court's questions, Perez's trial counsel stated, "I'll just move on." The district court responded: "No, no," to which Perez's attorney said, "We'll withdraw it." The district court then responded: "No. We're going to sustain the objection, and I'll instruct them to disregard." Perez's attorney responded: "Absolutely, judge." The court so instructed the jury.

Bello also testified; she testified that they had provided Rojas and Rubalcaba all relevant information and had relied on the tax professionals to prepare accurate income tax returns. Bello explained that she had informed Rojas and Rubalcaba that Perez had received a piece of land in payment of a $60,000 business debt and that, unbeknownst to the Perezes, Rojas and Rubalcaba had neglected to include that income on Perez's tax return.

After the close of evidence, the district court met with the attorneys in open court to discuss jury instructions. Perez, however, was not present for this conference. The government offered a jury instruction explaining the net worth method, but Perez's attorney stated that the defense did not want the jury provided with a net worth instruction because by explaining the net worth method to the jury, "[i]t's basically the stamp of approval by the court." He also

stated that Perez's defense was to challenge the accuracy and completeness of the net worth method.

The following day the judge revisited the issue, but Perez was also absent for this conference. The judge began by noting that Perez has "the right to instruct the jury on the net worth method." The court then asked Perez's attorney: "[D]o you wish to give the instruction?" He responded: "No, your Honor, we do not." The court then added: "You understand that you have an absolute right to give it, and you understand that if you offered such an instruction, I would give it." Again, Perez's attorney responded: "Yes, your Honor, I do." The court further clarified Perez's intent by asking: "In representing your client, you choose to follow a strategy that would not include giving this instruction?" Perez's attorney responded: "Correct, your Honor." The Assistant United States Attorney at this point noted that Perez was not present and the court followed up by asking Perez's attorney: "Have you discussed this with your client as well?" Perez's attorney replied: "I have discussed it with him. I haven't discussed it in terms of explaining *Tolbert*,[2] of course, and I will confirm this when he gets here. And if you would like, we can put it back on the record that I've now explicitly told him that." The court decided instead to direct Perez's attorney to

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[2] Perez's attorney was referring to *United States v. Tolbert*, 367 F.2d 778, 781 (7th Cir. 1966), where this court held that the lack of a net worth instruction constituted plain error. *See infra* at 11.

inform him of the court's comments and to tell Perez the court would give the instruction if he desired. The court then noted that "at the completion of the closing arguments, if you don't approach me and say you want the instruction given, I'll deem you to have waived whatever rights you have on behalf of your client with his concurrence to the giving of that instruction. Is that fair enough?" And Perez's attorney responded: "Fair enough, your Honor."

After closing arguments, Perez's attorney did not ask for the net worth method instruction, and it was not given. The jury convicted Perez on both counts, and the district court sentenced him to twenty-two months' imprisonment on count one and eleven months' imprisonment on count two, to run consecutively. Perez appeals.

II.

On appeal, Perez presents four challenges to his conviction. First, he argues that the district court violated his right under Federal Rule of Criminal Procedure 43 to be present at trial by conducting the jury instruction conference in his absence. Second, Perez challenges the district court's failure to provide a jury instruction on the government's net worth method of proof. Third, he argues the district court improperly barred his expert witness's testimony concerning general flaws in the net worth method. Finally, Perez claims that the evidence was insufficient to support his conviction. We address each issue in turn.

A. Federal Rule of Criminal Procedure 43

Perez first argues that the district court violated his rights under Rule 43 to be present at trial by conducting the jury instruction conference in his absence. Rule 43 provides that "the defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a). Rule 43(b)(3), however, provides that a "defendant need not be present [when] . . . [t]he proceedings involve only a conference or hearing on a question of law." The government claims that because jury instructions concern questions of law, Perez was not entitled to be at the jury instruction conference. Perez responds that because the issue of whether to give the net worth instruction concerned a question of strategy rather than of law, he had the right to be at the conference.

Perez's argument is misplaced. Courts are not in the business of holding hearings to oversee or approve a defendant's trial strategy; they hold hearings to address legal or factual issues (or sometimes both) or to establish case management schedules. True, trial courts often inquire into strategy to establish that waivers are knowing and voluntary and to preserve judicial resources (by avoiding the potential for reversible error or collateral attack). But a court's inquiry into a defendant's strategy does not alter the purpose of the conference, which in this case was to determine the appropriate jury instructions. The

content of jury instructions is a question of law, and as such the jury instruction conference, assuming *arguendo* it was a stage of trial, fell within the Rule 43(b)(3) exception for "a conference or hearing on a question of law." *United States v. Rivera*, 22 F.3d 430, 438-39 (2d Cir. 1994) ("The content of the instructions to be given to the jury is purely a legal matter, and a conference to discuss those instructions is thus a conference on a question of law at which a defendant need not be present.") (internal citations omitted); *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987) ("We hold that a hearing outside the presence of the jury concerning the selection of jury instructions is a 'conference or argument upon a question of law. . . .'"); *United States v. Graves*, 669 F.2d 964, 972 (5th Cir. 1982) ("A defendant does not have a federal constitutional or statutory right to attend a conference between the trial court and counsel concerned with the purely legal matter of determining what jury instructions the trial court will issue.").

Perez also argues that because his trial attorney objected to the government's net worth instruction based on strategy and not the law, Rule 43 required the district court to inform Perez of the discussions that occurred during the jury instruction conference and ask Perez his position on the issue. Again, Perez's position is misplaced. While a defendant

> has ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify

> in his or her own behalf, or take an appeal . . . the remaining decisions are in the hands of counsel. It could hardly be otherwise, unless trials are to be indefinitely extended as judges ask the defendant whether each decision (or omission) meets with his pleasure. The process would be worse than cumbersome. It would undermine the defendant's ability to entrust decisions to a legally trained person.

United States v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996).

The right to specific jury instructions is one of those "remaining decisions" that rests in the hands of the attorney. Thus, this court rejected the argument that a defendant must personally waive jury instructions in *United States v. Griffin*, 84 F.3d 912, 924 (7th Cir. 1996), holding:

> The right to object to jury instructions on appeal is waived if the record illustrates that the defendant approved of the instructions at issue. We do not require the defendant personally to waive objection, nor is the district court required to address the waiver question directly to the defendant. The waiver must, however, arise out of voluntary affirmative conduct, consistent with the proactive description of waiver in *Johnson*, 304 U.S. at 464 ("intentional relinquishment or abandonment").

Griffin then concluded that the defendant waived any objection to the jury instructions when "[h]is counsel

explicitly confirmed the district court's belief that the defendants would prefer [Instruction] 53A." *Id. See also United States v. Babul*, 476 F.3d 498, 500 (7th Cir. 2007) (explaining that some rights are so important that only a defendant may personally waive them, but "[b]y contrast, choices about trial practice and management – should a given witness's testimony be presented? should a hearsay objection be made? *what language should be proposed for the jury instructions?* – are committed to counsel, not only because they are numerous (asking the defendant each time would be impractical) but also because they are the sort of choices for which legal training and experience are most helpful") (emphasis added).

Similarly, in this case, while it would have been relatively easy (and prudent) for the district court to obtain Perez's personal waiver on the record, the court was not required to address the jury instructions directly with Perez.

B. Net Worth Jury Instruction

Next, Perez argues that the district court's failure to provide the net worth method instruction constitutes plain error which requires reversal of his conviction. This court has held that "the complete lack of any instruction on the nature of the [net worth] method and its concomitant assumptions and inferences affects a substantial right of the accused and constitutes plain error . . . and requires a reversal despite the lack of an objection by the defendant

to such omission." *Tolbert*, 367 F.2d at 781. But while we may use plain error review to correct serious errors despite a defendant's failure to object, such review "cannot be used for the purpose of revoking an otherwise valid waiver." *United States v. Lakich*, 23 F.3d 1203, 1207 (7th Cir. 1994). And here, Perez unquestionably waived his right to the net worth instruction: his attorney did not merely fail to object to the instruction, but rather insisted that the instruction *not* be given, even after having been expressly informed of the right to the instruction and that the court would deem the right waived.[3] Because Perez waived the right to the net worth instruction, there was no error. *Babul*, 476 F.3d at 500 ("Waiver means that there was no error; even plain-error review is unavailable."); *Boyd*, 86 F.3d at 722 ("But steps the court takes at the defendant's behest are not reversible, because they are not error; even the 'plain error' doctrine does not ride to the rescue when the choice has been made deliberately, and the right in question has been waived rather than forfeited.").

Moreover, even if Perez had not waived the issue, he could not establish plain error because the lack of the net worth instruction in this case was harmless. *See United States v. Olano*, 507 U.S. 725, 734-35 (1993) (holding that under plain error review, the question of prejudice is the same as the harmless

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[3] As noted above, *see supra* at 9-11, an attorney may waive the right to jury instructions on behalf of his client; a defendant need not personally waive his right to a net worth instruction.

error analysis, except that here, the defendant bears the burden of persuasion with respect to prejudice). The reason the net worth instruction is so imperative is that "the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth." *Holland*, 348 U.S. at 127. Thus, "without guarding instruction," there is "a great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows." *Id.* at 127-28. But in this case there was absolutely no evidence that Perez had nontaxable inflows which could explain the increase in his net worth. Accordingly, the failure to provide a net worth instruction would be harmless in any event.

C. Expert Testimony

Perez next argues that the district court erred in prohibiting his expert from testifying concerning flaws in the net worth method. However, as the trial transcript excerpted above makes clear, *see supra* at 4-5, after the government objected to Perez's attorney eliciting testimony from his expert on general flaws in the net worth method, Perez's attorney voluntarily abandoned this line of questioning. Therefore, Perez waived any challenge to the district court's ruling. *Cf. United States v. Wilkins*, 659 F.2d 769, 775 (7th Cir. 1981) (holding that defendant "in withdrawing

his motion to suppress waived any objection to the admission of the statement").

Perez's appellate attorney (who did not represent him below), attempts to avoid the waiver by asserting that seeking to withdraw the question was merely "a trial tactic to not give the jury the impression that he was asking improper questions." The record shows, however, that the exchange concerning limits on Perez's expert's testimony occurred during a side bar and thus outside the hearing of the jury. Additionally, Perez's proposal to "move on" and "withdraw the question" came in response to the district court's inquiry for the basis of the expert's opinion. Thus, the waiver came at a point when the district court was still willing to allow the question – assuming the expert's opinion was proper under *Daubert*. Finally, to the extent that Perez's trial attorney was making a tactical decision in withdrawing the question, as Perez's appellate attorney asserts, that actually supports a finding of waiver. *See, e.g., United States v. Cooper*, 243 F.3d 411, 416-17 (7th Cir. 2001) (holding that the defendant waived (as opposed to forfeited) any objection to the admission of evidence where conduct of the defendant's attorney demonstrated it was a strategic decision not to object, as opposed to a mere oversight).

D. Sufficiency of the Evidence

Finally, Perez argues that the evidence was insufficient to support the jury's verdict. A defendant

seeking to challenge the sufficiency of the evidence faces a daunting task. *United States v. Seymour*, 519 F.3d 700, 714 (7th Cir. 2008). "In considering a sufficiency of the evidence challenge, this court considers the evidence in the light most favorable to the Government, defers to the credibility determination of the jury, and overturns a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Huddleston*, 593 F.3d 596, 601 (7th Cir. 2010).

In this case, the jury convicted Perez of filing a false tax return in violation of § 7206(1). Section 7206(1) provides:

> Any person who [w]illfully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. 7206(1). "A conviction 'under section 7206(1) requires proof that: (1) a person made or subscribed to a federal tax return which he verified as true; (2) the return was false as to a material matter; (3) the defendant signed the return willfully and

knowing it was false; and (4) the return contained a written declaration that it was made under the penalty of perjury.'" *United States v. Powell*, 576 F.3d 482, 495 (7th Cir. 2009) (quoting *United States v. Presbitero*, 569 F.3d 691, 700 (7th Cir. 2009)).

In order to prove its § 7206(1) case, the government used the net worth method to show that Perez's federal tax returns were false, i.e., that he did not report all of his income. Specifically the government presented expert testimony from Richard Lexby, a CPA who has been an IRS revenue agent since 1978; Lexby has previously testified as an expert fourteen times in federal district court and four times in federal tax court. Lexby testified in great detail about how he calculated Perez's net worth and income, explaining that he had reviewed Perez's bank accounts, a check from Perez's in-laws, an IRA account, outstanding loans, real estate purchased by Perez, and the value of the Perezes' automobiles. Lexby walked the jury through his calculations, elaborating on each of the various components in his net worth analysis. Lexby then provided the jury with the bottom line, testifying that on December 31, 1999, Perez's net worth was approximately $100,000, that during 2000, he had expenditures of about $123,000, and that by the end of the year his net worth increased to $218,911. Lexby concluded that because Perez had reported income of only $125,079 for 2000, Perez's unreported income exceeded $100,000. For 2001, Lexby testified that Perez's net worth increased from $218,911 to $571,488 and that he had expenditures

of approximately $186,000. Lexby concluded that because Perez had reported income of only $268,387 for 2001, Perez had unreported income of more than $200,000.

Perez argues that the IRS's net worth evidence was insufficient to support his conviction because of numerous flaws in Lexby's analysis. However, as we explained in *United States v. Gonzalez*, 933 F.2d 417, 429 (7th Cir. 1991), "any questions or problems concerning the expert's opinion and testimony may be thoroughly explored during the cross-examination of the expert witness." In this case, Perez's trial attorney cross-examined the government's expert on the alleged flaws. The jury also heard the testimony of Perez's expert about these supposed flaws "and obviously rejected it; on a sufficiency-of-the-evidence challenge, we will not second-guess the jury's credibility determinations." *United States v. Olofson*, 563 F.3d 652, 659 n.6 (7th Cir. 2009).[4] Moreover, as this court made clear in *United States v. Pree*, 408 F.3d 855, 867 (7th Cir. 2005), "to establish falsity as to the [tax] returns, the Government needed only to prove that [defendant] had unreported income, not the exact amount of such unreported income or the existence of a tax deficiency." *See also Leeby v. United States*, 192 F.2d 331, 334 (8th Cir. 1951) ("It must be borne in mind that this was not an action to recover

[4] Perez does not argue that the district court abused its discretion in admitting Lexby's testimony under Rule 702.

the amount of income taxes alleged to be due, nor an action in which it was necessary to determine the exact amount of defendant's income for the years in question. On this phase of the case all that it was necessary to show was that there was omitted from the reported income a substantial amount."). Perez's own expert testified that he did not know the net effect of all the items and flaws he had purportedly identified. Thus, even if there were some flaws in Lexby's analysis, the jury still could have concluded that Perez had nonetheless failed to report a substantial amount of income.

Perez also argues that the evidence was insufficient to support a finding of willfulness. As noted above, to sustain a conviction under § 7206(1), the government must establish that the defendant willfully signed a false tax return. *See supra* at 15. In *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Supreme Court held that "[w]illfulness, as construed by our prior decisions in criminal tax cases, requires the government to prove that the law imposed a duty on the defendant, that defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Willfulness may be proven by circumstantial evidence. *United States v. Ytem*, 255 F.3d 394, 396 (7th Cir. 2001). And willfulness

> may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources

> of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

United States v. Eaken, 17 F.3d 203, 206 (7th Cir. 1994) (quoting *Spies v. United States*, 317 U.S. 492, 499 (1943)).

In this case, the evidence established that Perez knew he had a duty to report income from his various drywall jobs – because he did in some instances. The evidence was also more than sufficient to support the jury's verdict that Perez willfully violated that duty by not reporting all of his income on his income tax returns. Specifically, the evidence showed that Perez was in control of the financial affairs of his drywall business, that he often received payment in cash for drywall work, and that he made substantial cash investments in real estate, cars, and collectible weapons. The evidence also showed that Perez received cash payments from customers and did not inform his wife of all of those payments, and his wife was the one who provided the financial information to the tax preparer. Additionally, the government's net worth expert explained how the increase in Perez's net worth during the 2000 and 2001 tax years meant that Perez had under-reported his taxable income for those years by nearly $300,000. Perez's use of discounts for cash jobs – i.e., jobs where there is no paper trail – is further circumstantial evidence of intent. *See, e.g., United States v. Roman*, 492 F.3d 803, 804 (7th Cir. 2007) (noting that "a lot of 'cash' that changes hands

in the underground economy, . . . [does] not find [its] way onto . . . federal income tax returns"). Together, this evidence reasonably supported the jury's conclusion that Perez willfully filed false income tax returns.

In response, Perez argues that the evidence was not sufficient to show that he willfully filed a false tax return because he reasonably relied upon his tax preparers to report the correct income. Perez correctly notes that

> [i]t is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant qualified to prepare federal tax returns, and that the defendant adopts and files the return as prepared without having reason to believe that it is incorrect.

United States v. Whyte, 699 F.2d 375, 379 (7th Cir. 1983).

However, in this case, the jury could have reasonably concluded, based on testimony from the government's expert, that Perez did not provide his tax preparers with complete information of all sources of income given the extent of the increase in his net worth during the time period at issue. The jury also could have reasonably concluded that Perez did not provide his tax preparers full information concerning business expenses. Specifically, the government presented testimony from Rojas that on April 14,

2001, the day before his 2000 tax return was due, Perez, accompanied by his wife, went to Rojas's office and gave him a list of deductions; those deductions exceeded the amount of deductions Rojas had calculated using the information Bello had previously provided by more than $111,000. Rojas further testified that Perez had no supporting documentation for these deductions. Bello denied the April 14, 2001, meeting occurred and maintained that they never gave Rojas any revised figures for deductions, claiming instead that Rojas had made the changes on his own. The jury, however, could have reasonably disbelieved Bello's testimony and concluded that they had falsely provided a list of deductions to Rojas. And if the jury concluded Bello was lying about this meeting and these deductions, it likewise could have reasonably concluded that she was lying to cover up for Perez's willful false reporting of income.

Perez further asserts that the evidence was not sufficient to show willful intent to falsely report income because his wife brought to the attention of their accountants the land they received in payment of a $60,000 debt. Perez argues that

> [i]f he was trying to falsify anything he would have kept this transaction hidden in that by disclosing it he was in essence increasing his net liability not decreasing it. This fact alone shows that Mr. Perez's return was not a willful false return as alleged, but rather a complicated one which confounded

> everyone, even two experienced accountants which he relied on.

Appellant Brief at 35. The jury, however, heard this evidence and nonetheless concluded that Perez willfully withheld information about other income from his tax preparers. We cannot say that the jury acted unreasonably in so concluding. *See, e.g., Powell*, 576 F.3d at 495 (rejecting defendant's argument that evidence was insufficient to establish willfulness where he had filed an amended tax return, noting that "for what it was worth, [the defendant] was able to put that evidence in front of the jury"); *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (affirming defendant's conviction under § 7206(2) and holding the jury was entitled to discredit evidence that defendant relied on two attorneys, one of whom was also a CPA, in finding defendant acted willfully). Moreover, given the large amount of unreported income (as established through the net worth method), a reasonable jury could have concluded that Perez willfully failed to report all of his income.

III.

The district court did not violate Perez's right under Federal Rule of Criminal Procedure 43 to be present at trial by conducting a jury instruction conference in his absence because such a conference concerns questions of law and is thus exempt from Rule 43. Perez, through his attorney, waived any challenge to the district court's failure to provide a

jury instruction on the government's net worth and expenditure method of proof. Perez also waived any challenge to the district court's limitation on his expert witness's testimony. Finally, the evidence was more than sufficient to support the jury's finding that Perez willfully filed false income tax returns in violation of § 7206(1). For these and the foregoing reasons, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 07 CR 166
Plaintiff,	)	Chicago, Illinois
-vs.-	)	February 28, 2008
	)	7:45 o'clock a.m.
FLAVIO PEREZ,	)	[DOCKETED
Defendant.	)	MAY 6 2008]

VOLUME 3
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN W. DARRAH,
and a jury

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[427] THE COURT: We've had a discussion off the record, and the Court has discussed with counsel United States versus Tolbert, which can be found at 367 F2d 778, on the issue of a net worth instruction, and U.S. v Whyte at 699 F2d 375 on the issue of the reliance defense.

And based on the Whyte case I will, over the government's objection, give the reliance instruction. Do you know offhand, Adam, what number that is?

MR. PODLISKA: It's 34, your Honor.

THE COURT: John, that's over your objection.

MR. PODLISKA: But the defense has withdrawn that phrase "or access thereto".

THE COURT: The Whyte court said that "or access thereto" was redundant and was properly excluded.

So you won at least a little phrase out of that, John.

MR. PODLISKA: And we'll prepare that.

THE COURT: Okay. The thing that's a little more perplexing is the Tolbert case and the net worth method of proof instruction. And in that case it apparently was the intention of the parties that two instructions on this point be given, apparently through inadvertence of the trial court judge.

The Seventh Circuit held that the failure to give that instruction was plain error because with respect to the [428] scope of the instruction to be given in a net worth prosecution – let me say that again.

The instruction to be given in a net worth method prosecution as enunciating a prerequisite essential to safeguard a substantial right of the accused.

So the Tolbert court was concerned about the possible unreliability of the net worth method and – of course, that was back in 1966 – and pointed out that there are other sources of income which would not be taxable, such as gifts, inheritance, loans and the like. And the Court said there's great danger that the jury may assume, once the government has established figures in its net worth computation, the crime of tax evasion automatically follows.

In this case I think it has been clearly stated by the government that its theory of net worth does not include any non-taxable sources of income. In fact,

the government has offered proof in that regard, and I assume the government is going to argue that.

MR. PODLISKA: Yes, your Honor.

THE COURT: But more importantly, the Tolbert case holds that the right to instruct the jury on the net worth method is a substantive right inuring to the accused, in this case Mr. Perez.

So I'll ask the defendant, do you wish to give the instruction?

[429] MR. COTTER: No, your Honor, we do not.

THE COURT: You understand that you have an absolute right to give it, and you understand that if you offered such an instruction, I would give it.

MR. COTTER: Yes, your Honor, I do.

THE COURT: All right. In representing your client, you choose to follow a strategy that would not include giving this instruction?

MR. COTTER: Correct, your Honor.

THE COURT: Okay.

MR. PODLISKA: And I take it since Mr. Perez isn't here – this is something that we've been discussing over the past couple three days –

THE COURT: Right. Have you discussed this with your client as well?

MR. COTTER: I have discussed it in – I have discussed it with him. I haven't discussed it in terms of explaining Tolbert, of course, and I will confirm this when he gets here. And if you would like, we can put it back on the record that I've now explicitly told him that.

THE COURT: Let's do this: I'll direct you to relay the Court's comments to him, that I will give the instruction if you offer it.

MR. COTTER: Certainly.

THE COURT: And then at the completion of the [430] closing arguments, if you don't approach me and say you want the instruction given, I'll deem you to have waived whatever rights you have on behalf of your client with his concurrence to the giving of that instruction. Is that fair enough?

MR. COTTER: Fair enough, your Honor.

THE COURT: Okay.

(Discussion had off the record.)

THE COURT: The government said there will be no objection to the giving of 34. There was some language in the proposed instruction 34, I think the phrase "or access thereto". And the Whyte case – no, the Tolbert case expressly addressed that and said that that language was –

MR. COTTER: Whyte.

THE COURT: I'm sorry, the Whyte case said that that language was unnecessary. And I take it the defense has removed that?

MR. COTTER: We have.

THE COURT: You have no objection to doing that?

MR. COTTER: No objection to doing that, your Honor.

MR. PODLISKA: Your Honor, I would raise with the Court one point that we did not discuss when we were dealing with this yesterday.

Government Instruction 12 is the other crimes evidence instruction. We did submit that, but that 404(b)

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